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No. 09-857

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANNE DOYLE,

Petitioner,

v.

LELAND GRASKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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REPLY BRIEF

The inconsistent, incomplete analysis found in the Brief in Opposition reflects the state of the law in the lower courts. It has been thirty years since this Court's decision in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980), twenty years since *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), and nine years since *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 121 S.Ct. 1927 (2001). Despite the passage of time, there is still confusion and inconsistency in the lower courts regarding loss of consortium damages for injuries to nonseafarers. There is also confusion regarding the use of state law remedies in admiralty cases. Consideration of this case will allow this Court to resolve the confusion surrounding these important issues.

ARGUMENT

Graske argues that there is no split among the circuits. He states that only the Ninth and Fifth Circuits have addressed the issue of loss of consortium damages for injury to a nonseafarer. However, his argument unravels because the Fifth Circuit decision he relies on, *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994), involves an injury to a longshoreman. Graske himself recognizes that a longshoreman is not included in the definition of a nonseafarer. Brief in Opposition, p.1, n.1. Thus,

Graske is left with only the Ninth Circuit as having rendered a decision within his narrow formulation of the issue. However, even that position is inaccurate.

Graske cannot avoid the impact of the decision in *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2nd Cir. 1994). The decision of this Court in *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629 (1996) did not change the law in the Second Circuit regarding loss of consortium damages under general maritime law. As recognized by the Court in *Wartman v. Commodore Cruise Line, Ltd.*, 100 F.3d 943, 1996 WL 47964 (2nd Cir. 1996), loss of consortium damages are available for an injury to a nonseafarer. Thus, even if one accepts Graske's narrow framing of the issue, there is a split between the Ninth Circuit and the Second Circuit.

To avoid the impact of the decisions by the First Circuit and the Third Circuit, Graske tries to frame the issue narrowly. However, the issue in this case is not so narrow. This case presents one aspect of a larger issue: what is the scope of the remedies available for negligence under general maritime law?

This Court addressed one aspect of this larger issue in *Garris*, supra. Paraphrasing Justice Scalia: "The question presented in this case is whether the negligent breach of a general maritime duty of care is actionable when it causes [loss of consortium], as it is when it causes injury." *id* at 532 U.S. 812. This issue needs to be addressed by this Court because of the inconsistent decisions by the lower courts.

The reasoning applied in *Garris* is equally applicable to this case. In *Garris* this Court recognized a wrongful death action for negligence because it was not prohibited by any of the maritime statutes. Likewise, Anne Doyle has a cause of action for her loss of consortium because it is not prohibited by any of the maritime statutes. The courts that have decided otherwise are simply ignoring the principles set forth in the *Garris* decision.

Just as he ignores the *Garris* decision, Graske also ignores the criticism of the Ninth Circuit's decision in *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994). For instance, on page 14 of his Brief, Graske quotes from Thomas J. Schoenbaum, *1 Admiralty and Mar. Law* §5-16 (4th ed.). However, he fails to address the totality of Professor Schoenbaum's opinion on this issue:

> Thus, the state of the law at the present time seems to be that loss of society/consortium is not available under the general maritime law, but may be recovered under the *Yamaha* doctrine for deaths and injuries in state waters. **This is untenable, however.** First, the important maritime value of uniformity is offended by such a rule. Second, the view that loss of society is not available under the general maritime law misconstrues the Supreme Court's holding in *Miles*. The better view is that loss of consortium and society are recoverable under the general maritime law except in actions by seaman against their employers and where

> the cause of action is based on a statute that precludes such damages. (emphasis added)

Professor Schoenbaum also agrees that there is confusion in the lower courts regarding loss of consortium under general maritime law.

Graske's argument regarding the applicability of state law in this case simply highlights another issue that should be addressed by this Court. As this Court has observed:

> The federal cast of admiralty law, we have observed, means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.' . . . Our precedent does not precisely delineate that scope.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, at 210, n.8, 116 S.Ct. 619 (1996) (citing *Romero v. International Terminal Operating Co.*, 385 U.S. 354, at 373, 79 S.Ct. 468 (1959)).

One of the unique aspects of this case is that the Doyles and Graske are private citizens of the same state. Whether it is recognition of Nebraska's strong interest in remedies for torts between its own citizens, or under a choice of law analysis, it is evident that Nebraska law should be utilized to supplement the remedies under general maritime law in this case. Pet. App. 64-65. Thus, this case presents a unique opportunity to address an important aspect

of this Court's admiralty jurisdiction: defining the delicate balance between state law and federal maritime law.

CONCLUSION

There is a split among the courts of appeals regarding the availability of a remedy for loss of consortium under general maritime law. It has been many years since this Court's decisions in *Alvez* and *Miles*. Despite the clarification provided in *Garris*, confusion reigns in the lower courts. Part of this confusion includes the scope of state law remedies under federal admiralty law. Anne Doyle's Petition for Writ of Certiorari should be granted so that this Court can provide direction to the lower courts, and alleviate the inconsistent decisions of the lower courts regarding these issues.

Respectfully submitted,

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